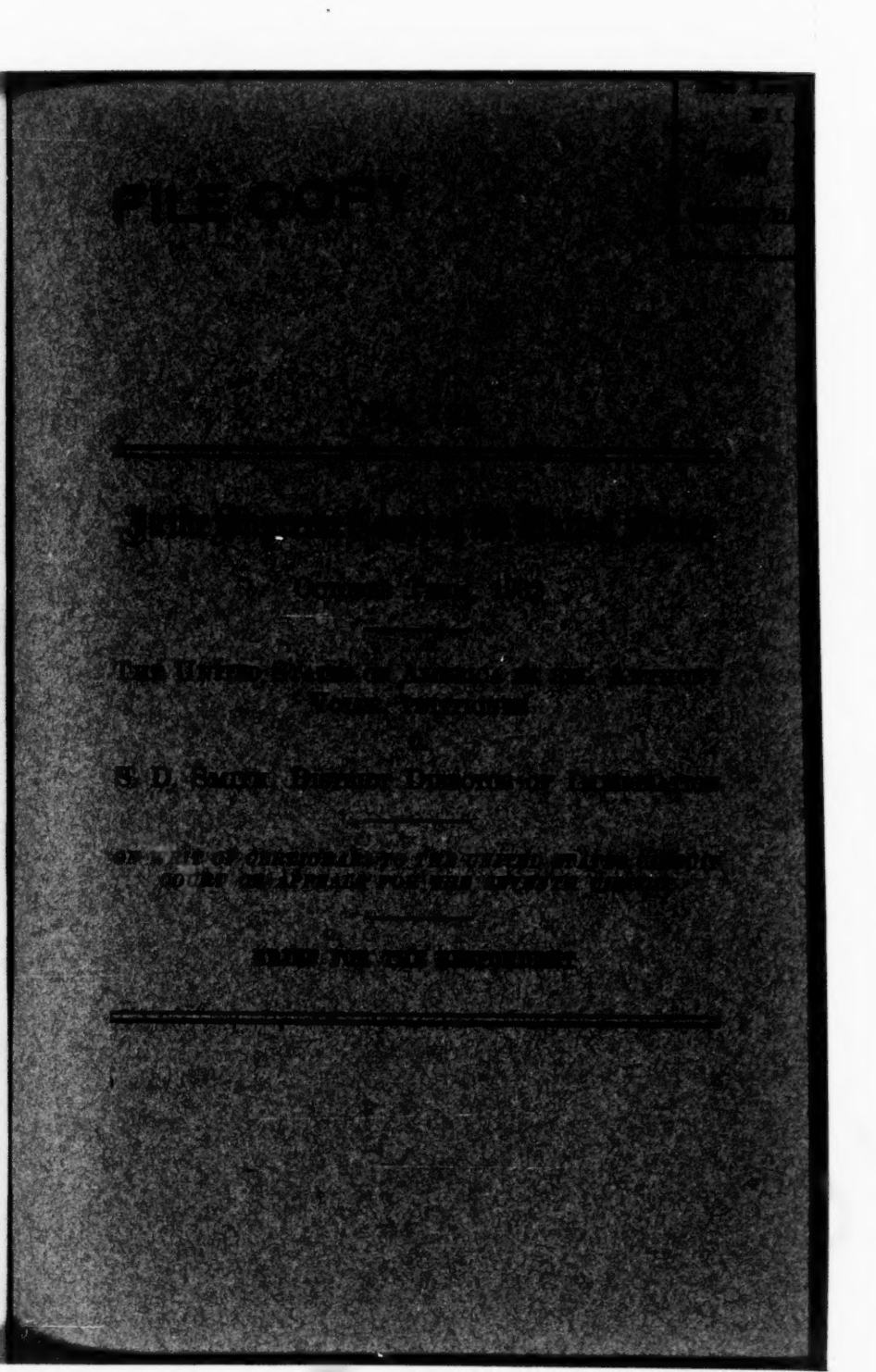

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 724

THE UNITED STATES OF AMERICA EX REL. ANTHONY Volpe, petitioner

v.

S. D. SMITH, DISTRICT DIRECTOR OF IMMIGRATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

Neither the oral opinion of the District Court (R. 147–154) nor the first opinion of the Circuit Court of Appeals (R. 169–178) has been reported. The majority (R. 180–186) and dissenting (186–196) opinions of that court, rendered on rehearing, are reported in 62 F. (2d) 808.

JURISDICTION

The judgment of the court below was entered January 11, 1933 (R. 196). On February 1, 1933, a petition for rehearing was denied (R. 197).

The petition for certiorari was filed February 24, 1933, and granted March 27, 1933 (R. 200). Jurisdiction to issue the writ is conferred upon this Court by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

In response to the petition for the writ in this case we suggested abatement of the proceeding. In Appendix B to this brief we have brought together for the convenience of the Court the considerations which seem to us material upon this question. The question is also discussed in petitioner's brief in reply to the suggestion of abatement. So far as the Government is concerned, we should be glad to have the Court conclude that this case may be considered and decided upon its merits.

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals erred in sustaining both of the grounds set forth in the warrant of deportation, the District Court having rejected one of those grounds, and the respondent not having taken a cross appeal.

2. Whether an alien who is convicted in this country of a crime involving moral turpitude prior to his last entry may be deported.

3. Whether the petitioner had been convicted of a crime involving moral turpitude.

4. Whether an alien who is permitted to enter this country upon his false statement that he is an American citizen thereby enters without inspection.

5. Whether there was sufficient proof of petitioner's alienage.

6. Whether petitioner was accorded a fair hearing by the immigration authorities.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Immigration Act of 1917 will be found in Appendix A, pp. 36–37, *infra*.

STATEMENT

Petitioner, who is now about 42 years old, was born in the Argentine Republic of Italian parents (R. 21). When he was fourteen he was taken to Italy, where he was registered as an Italian citizen (R. 21, 49). On March 31, 1906, at the age of sixteen, he came to this country accompanied by his mother, two brothers and his sister, and was admitted as a citizen of Italy (R. 25, 62). He has since continued to reside here (R. 31). In 1915 he married (R. 16), and his family now consists of his wife and three children, all born in this country (R. 16).

On March 27, 1920, petitioner was admitted to citizenship by a judge of a State court in Illinois, but on April 3, 1920, seven days later, and apparently with the acquiescence of the petitioner, the order admitting him to citizenship was set aside and his certificate of naturalization canceled (R. 22–23). Thereafter the petitioner again took out first papers, and in January, 1931, applied for his second papers (R. 22).

On February 27, 1925, an indictment in 26 counts was returned against the petitioner and others in the District Court of the United States for the Northern District of Illinois. This indictment was based upon Sections 148, 150, 151, 219 and 37 of the Criminal Code, and charged the defendants with possessing, making and uttering counterfeit Government obligations with intent to defraud; with making and possessing plates designed for the printing of counterfeit Government obligations; with counterfeiting and possessing counterfeited postage stamps of the United States; and with conspiring to commit all of these various offenses (R. 63–81). After a trial, at which the jury disagreed (R. 129), petitioner entered a plea of guilty to the indictment and was sentenced to imprisonment in a county jail for a period of thirty days (R. 83–84).

In June, 1928, petitioner, together with a party of friends, went to Havana, Cuba (R. 55). They stayed there a few days, and on June 24, 1928, returned to this country by aeroplane, landing at Key West, Florida (R. 27). According to the testimony of the immigrant inspector who examined petitioner and his party, as supplemented by certain Government exhibits, petitioner stated that he was a naturalized citizen of the United States, and that he could not produce his certificate because it was in Chicago but did not disclose that his certificate of naturalization had been canceled (R. 90–91, 99. See also R. 27, 85–86, 133–

135). Being satisfied that petitioner was what he claimed to be, the inspector, after a brief examination, admitted him. (R. 91.) There is nothing in the record to indicate that petitioner informed the inspector of his conviction under the indictment referred to above.

Upon the basis of certain voluntary statements made by the petitioner upon examination by an immigrant inspector into his right to remain in this country (R. 48–61), a warrant for the arrest of petitioner was issued by the Department of Labor on December 11, 1930. This warrant charged petitioner with being unlawfully in this country on the ground that he had been convicted of a crime involving moral turpitude, i.e. possessing and passing counterfeit war savings stamps, prior to his entry from Cuba in the summer of 1928, and that he was not at the time of such entry in possession of an unexpired immigration visa (R. 13–14). He was taken into custody under this warrant but was shortly thereafter admitted to bail (R. 14). On January 3, 1931, he was accorded a hearing before an immigrant inspector, at which he was represented by counsel (R. 14–15). At this hearing, which was continued from time to time, a number of witnesses, including petitioner, were examined both by the inspector and by petitioner's counsel (R. 14–48). During this hearing the charge contained in the warrant of arrest was amended by a more complete summary of the offenses specified in the indict-

ment under which petitioner was convicted (R. 28), and an additional charge was made of entering this country on his return from Cuba by false and misleading statements, thereby entering without inspection (R. 28). No objection was made by petitioner to the amendment of the warrant or to the introduction of the additional charge. On January 21, 1931, the hearing was closed by the inspector with the reservation, however, that it was subject to be reopened at the call of the Government for the introduction of additional evidence, if necessary (R. 48). Prior to the conclusion of the hearing petitioner's counsel were advised by the inspector that a transcript of the hearing would be furnished them and that they would be given an opportunity to submit briefs (R. 47–48). Also, they were asked by the inspector whether they were of the opinion that their client had been accorded a fair hearing and one of them responded, "we think it has been entirely fair" (R. 48).

On February 25, 1931, a warrant of deportation was issued upon two of the grounds which were under consideration at the immigration hearing, i.e., that the petitioner entered in 1928 by means of false and misleading statements, thereby entering without inspection, and that he had been convicted of a crime involving moral turpitude prior to such entry (R. 7). Petitioner was taken into custody under this warrant and on March 19, 1931, filed a petition for writ of habeas corpus in the Dis-

trict Court of the United States for the Northern District of Illinois (R. 2–7). This petition attacked the order of deportation on a number of grounds, some of which are not now urged. On the same day that the petition was filed the writ issued and petitioner was released pending the proceedings in the District Court upon the bond which he had given to the immigration authorities (R. 8).

On March 31, 1931, prior to the filing of a return to the writ of habeas corpus, the hearing before the immigrant inspector was reopened at the direction of an Assistant Secretary of Labor and additional testimony was taken (R. 86–135). The bulk of this testimony was given by the inspector who examined petitioner and his party when they returned from Cuba and bore upon the charge that petitioner entered without inspection because of false and misleading statements as to his citizenship. Following this hearing another warrant of deportation was issued on April 28, 1931. This warrant was based upon the same grounds as the warrant of February 25, 1931, and superseded that warrant (R. 138–139). Thereafter a return to the writ of habeas corpus was filed (R. 10–12). After a hearing, at which testimony was introduced on behalf of the petitioner, which related, among other things, to the identification of petitioner at the immigration hearing by the inspector who admitted him on his return from Cuba (R. 139–146), and which was followed

by testimony for the Government on this subject (R. 146), the District Court dismissed the writ of habeas corpus and directed that the petitioner be remanded to the custody of the respondent for deportation to Italy (R. 155). In an oral opinion the court held that petitioner could not be deported on the charge that he had been convicted of a crime involving moral turpitude prior to his entry from Cuba in 1928, because the applicable portion of Section 19 of the Immigration Act of 1917 referred only to crimes committed abroad and not in this country, but that he was deportable on the charge that he had entered in 1928 by means of false and misleading statements, thereby entering without inspection. (R. 147–151.)

An appeal was allowed by the District Court to the Circuit Court of Appeals for the Seventh Circuit (R. 156–163). In its order allowing the appeal the court directed that the appeal should operate as a supersedeas and that the petitioner should be admitted to bail during the pendency of the appeal. In an opinion rendered June 21, 1932, the Circuit Court of Appeals held that petitioner was not deportable on either of the grounds stated in the warrant of deportation (R. 169–178). Thereafter the Government filed a petition for rehearing which was granted (R. 178–179). On January 11, 1933, the court filed a second opinion in which it held that both of the grounds for deportation stated in the warrant were valid and af-

firmed the order of the District Court (R. 180–186, 196). One judge dissented (R. 186–196). Thereafter the court denied a petition for rehearing filed by the petitioner. (R. 197.)

SUMMARY OF ARGUMENT

Petitioner was deportable as an alien convicted of a crime involving moral turpitude "prior to entry" under Section 19 of the Immigration Act of 1917. Petitioner's entry from Cuba in 1928 was an "entry" as previously defined by this Court. The pertinent provision of Section 19 is complementary to the provisions of Section 3 of the Act dealing with grounds for exclusion. Petitioner was excludable under Section 3 and having avoided inspection by falsely claiming to be an American citizen he may be deported. The provision in Section 19 for the deportation, within a limited period, of aliens who commit crimes after entry does not affect the proper construction of the portion of the statute involved here. The statute clearly makes a distinction between aliens who commit crimes in this country and remain here and those who are excludable and therefore are not entitled to be here at all. There is no occasion for distortion of the plain language of the statute and under it petitioner was clearly deportable.

The petitioner was convicted of counterfeiting Government obligations, and that is a crime involving moral turpitude.

By falsely representing himself to be a citizen of the United States when he entered from Cuba in 1928, petitioner avoided inspection as an alien, and thus defeated any inquiry to determine whether he was excludable. Like other aliens he was subject to inspection, and having avoided it by false statements he was also deportable as an alien who entered "without inspection" under Section 19 of the Immigration Act of 1917. Neither previous domicile in the United States nor the fact that he was not required to have a visa or permit to reenter relieved him from the necessity of inspection.

Even if the question were open here, the finding that petitioner was an alien is not open to attack. The fact that he was an alien was sufficiently established by his admissions.

Within settled rules for the determination of the fairness of administrative hearings, an examination of the record conclusively shows that petitioner had a fair hearing and that there was no denial of due process.

ARGUMENT

The District Court dismissed the writ of habeas corpus and remanded the petitioner for deportation because he had entered without inspection, rejecting the other ground stated in the warrant of deportation that petitioner had been convicted of a crime involving moral turpitude prior to entry (R. 147–155). The Circuit Court of Appeals sus-

tained the warrant upon both grounds (R. 180–186). No cross appeal by the Government was necessary to sustain the dismissal of the writ upon a ground rejected in the District Court (see *Story Parchment Co.* v. *Paterson,* 282 U.S. 555, 560; *Smith* v. *Whitney,* 116 U.S. 167, 175), and the question whether petitioner was lawfully held for deportation upon either of the charges contained in the warrant is, therefore, properly before this Court.

I

PETITIONER WAS LAWFULLY HELD FOR DEPORTATION BECAUSE OF HIS CONVICTION OF A CRIME INVOLVING MORAL TURPITUDE PRIOR TO ENTRY INTO THE UNITED STATES

Section 19 of the Immigration Act of 1917, 39 Stat. 874, 889–890 (U.S.C., Title 8, Sec. 155), provides in part:

> * * * any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.

Some nineteen years after petitioner's original entry into the United States petitioner was convicted of a crime involving moral turpitude. He subsequently left the United States on a brief trip to Cuba, and upon his reentry into the United States, more than five years after his conviction, he was held for deportation upon the ground that

he had been convicted of a crime involving moral turpitude "prior to entry."

The language of the statute is very simple and very clear, and its possibilities of interpretation seem to have been exhausted by the decisions of this Court which have defined the word "entry." In *United States ex rel. Claussen* v. *Day*, 279 U.S. 398, 401, this Court defined the word "entry" as used in Section 19 of the Immigration Act of 1917, saying:

> The word "entry" by its own force implies a coming from outside. The context shows that in order that there be an entry within the meaning of the Act there must be an arrival from some foreign port or place.

And in *United States ex rel. Stapf* v. *Corsi*, 287 U.S. 129, 132, which construed the word "entering" as used in Section 14 of the Immigration Act of 1924, the Court said, with reference to its decision in the *Claussen case*:

> While that case construed Section 19 of the Act of February 5, 1917, and the time limitation on deportation therein contained, the decision as to what constitutes an entry is equally conclusive in construing other sections of the immigration law.

Applying this definition of the word "entry" to the provision of Section 19 here involved, it is clear that the petitioner was convicted of a crime involving moral turpitude "prior to entry" (that is,

prior to his entry from Cuba in 1928) and he was therefore lawfully held for deportation. There is nothing in the statute which forbids deportation because the crime was committed in the United States. Irrespective of his length of residence in the United States, the petitioner remained an alien, as defined in the Immigration Acts of 1917 and 1924 (Immigration Act of 1917, Sec. 1, 39 Stat. 874, U.S.C., Title 8, Sec. 173; Immigration Act of 1924, Sec. 28, c. 190, 43 Stat. 153, 168 (U.S.C., Title 8, Sec. 224), and upon his return from Cuba was subject to exclusion because he was a person who had been convicted of a crime involving moral turpitude. (Immigration Act of 1917, Sec. 3, 39 Stat. 874; U.S.C., Title 8, Sec. 136.) Having evaded inspection by claiming citizenship, petitioner was subject to deportation upon the same ground for which he should have been excluded. This is apparent upon a comparison of the applicable provisions of Section 19 of the Immigration Act of 1917 with the corresponding provisions of Section 3 of the same Act. Section 19, providing for the deportation of aliens convicted of crime prior to entry, complements the corresponding provisions of Section 3 requiring exclusion of all persons convicted of crimes involving moral turpitude. If these sections are thus construed as complementary one to the other, there can be no reason for distinctions predicated upon crimes committed abroad

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and crimes committed in this country. The test of exclusion is personal, and the place where the crime was committed makes the alien no less, or no more, desirable. Section 19 requires the deportation of any alien who was convicted prior to entry of a felony or other crime or misdemeanor involving moral turpitude. The definition of an "alien" in Section 1 was predicated upon the decision of this Court in *Lapina* v. *Williams*, 232 U.S. 78 (see S.Rep. 352, 64th Cong., 1st Sess., page 3), where it was held that the term "alien" applies to all aliens "irrespective of any qualification arising out of a previous residence or domicile in this country". See *Lewis* v. *Frick*, 233 U.S. 291, 297; *Bugajewitz* v. *Adams*, 228 U.S. 585. Thus it appears that the petitioner was an alien, subject to deportation notwithstanding his previous residence or domicile in this country, if at the time of his entry he had at any time been convicted of a crime involving moral turpitude. His exclusion upon his arrival in this country was required by the plain language of Section 3, and his admission was in violation of that section. His deportation, upon discovery of the fact that he had been illegally admitted, was required by the equally plain language of Section 19.

The fact that in another clause, dealing with deportation of aliens who remain continuously in this country, and not with their exclusion for crimes committed prior to entry or with their de-

portation after admission contrary to this requirement of exclusion, reference is made to crimes committed in the United States, seems to us to have no limiting effect upon the plain meaning of the complementary provisions contained in Section 3 and Section 19 relating to the exclusion and deportation of aliens who admit the commission of, or who have been convicted of, crimes "prior to entry."

The construction of the statute for which we contend, which was upheld by the court below, is supported by *Medich* v. *Burmaster*, 24 F. (2d) 57 (C.C.A. 8th); *Riley* v. *Howes*, 17 F. (2d) 647, 649 (Maine), reversed on other grounds, 24 F. (2d) 686 (C.C.A. 1st); *Gomes* v. *Tillinghast*, 37 F. (2d) 935 (Mass.). The following cases have reached a contrary conclusion: *Browne* v. *Zurbrick*, 45 F. (2d) 931, 933 (C.C.A. 6th); *United States ex rel. Consiglio* v. *Day*, 55 F. (2d) 228 (C.C.A. 2d); *Wilson* v. *Carr*, 41 F. (2d) 704, 706–707 (C.C.A. 9th)[1]; *Nagle* v. *Lim Foon*, 48 F. (2d) 51, 53–54 (C.C.A. 9th)[1]; *United States ex rel. Linklater* v.

[1] These cases would seem to be contrary to the previous decisions supporting the Government's position by the Circuit Court of Appeals for the Ninth Circuit in *Bendel* v. *Nagle*, 17 F. (2d) 719, 720, and *Weedin* v. *Yamada*, 4 F. (2d) 455. Attention is called, however, to the decisions of that court in the cases of *Wong Yow* v. *Weedin*, 33 F. (2d) 377, and *Ex parte Keizo Shibata*, 35 F. (2d) 636, where the court appears to have held that an alien may be deported where he has been *convicted* of a crime committed in this country prior to entry, but not where he has merely *ad-*

Commissioner of Immigration, 36 F. (2d) 239 (S.D.N.Y.). The primary basis of the latter decisions is that Section 19 of the Immigration Act of 1917 also provides for the deportation of an alien "sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude committed within five years after the entry of the alien into the United States." Accordingly it is concluded in these decisions that the provision here in question for deportation of aliens convicted of crimes prior to entry must have relation to the commission of crimes abroad. This view plainly overlooks the fact that these two provisions are not complementary. One deals with aliens who are entitled to admission when they enter the country and are to be deported for offenses committed after entry, having no relation to their right to enter the country. The other deals with aliens, who, having committed crimes prior to entry, have been admitted contrary to law and may therefore be deported. It was a very fair distinction for Congress to limit the right of

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mitted that he has committed such a crime. (Cf., however, *Ex parte Chin Chan On*, 32 F. (2d) 828, 829 (W.D.Wash.). But in a later case (*Masaichi Ono* v. *Carr*, 56 F. (2d) 772, 773) the Circuit Court of Appeals for the Ninth Circuit held, distinguishing the *Yamada* and *Shibata* cases, that an alien may be *excluded* under the corresponding provisions of Section 3 of the Immigration Act of 1917, where he admitted the commission of a crime in the United States prior to entry.

deportation in the former case by a statutory period of limitation, and in the latter case to predicate the right of deportation upon the fact that the alien was not entitled to be here at all if at any time prior to entry he had been convicted of a crime involving moral turpitude. This is the distinction which must be drawn if the plain words of the statute are given their ordinary meaning. The distinction is not so absurd and irrational as to constrain distortion of language. And we believe there is no warrant in this case for reading into one provision the language contained in the other. Presumably it was omitted because Congress intended the law to have different applications in different cases, and the courts may not defeat this express intention by reading both clauses as if their words were the same. Such a process is not interpretation. It is reading into plain and simple phrases of clear and certain meaning a limitation unexpressed and contrary to the sense of the statute.

Under the decision of this Court in the *Claussen case, supra,* there is no ground for conclusion that the word "entry" in the clause here under consideration means only an alien's original entry from abroad. Had Congress intended any such distinction it would be found in the simple language it employed to express its meaning. The decisions opposed to our view ignore this principle and seem to have been influenced by a desire to ameliorate

the harshness of the immigration laws, but this is not within the judicial province if Congress has clearly expressed its purpose. Cf. *Commissioner of Immigration* v. *Gottlieb*, 265 U.S. 310, 314; *Chung Fook* v. *White*, 264 U.S. 310, 314; *Bugajewitz* v. *Adams*, 228 U.S. 585, *supra*; *Zakonaite* v. *Wolf*, 226 U.S. 272; *Fong Yue Ting* v. *United States*, 149 U.S. 698; *Todaro* v. *Munster*, 62 F. (2d) 963 (C.C.A. 10th), certiorari denied, April 17, 1933, No. 773, October Term, 1932.

The fact that an alien commits a crime in this country and may not be deported because the statutory limitation has run does not confer the right to leave the country voluntarily and thereafter reenter without meeting the qualifications which must be met by those aliens who come here for the first time. The test of the right of entry is personal. The inquiry is whether the applicant has certain criminal tendencies. When or where he committed the disqualifying offenses is of no importance. The petitioner was subject to exclusion under the plain language of Section 3, and having evaded inspection, by claiming to be a citizen, he is subject to deportation under the same language employed in Section 19.

II

PETITIONER WAS CONVICTED OF A CRIME INVOLVING MORAL TURPITUDE

Petitioner contends that the offenses of which he was convicted were not crimes involving moral

turpitude. The opinions below did not discuss this question, it does not appear to have been covered by any specific assignment of error in the court below (R. 156–161, 162), and examination of the briefs filed on behalf of petitioner in that court discloses that the point was not there urged. Under these circumstances we do not believe that the question is properly before this Court, but if it is, we submit that petitioner's contention is wholly without merit.

The indictment returned against petitioner charged violations of Sections 148, 150, 151, 219, and 37 of the Criminal Code (U.S.C., Title 18, Secs. 262, 264, 265, 348, 88). It charged the petitioner and others with possessing, making, and uttering counterfeit Government obligations with intent to defraud; with making and possessing plates designed for the printing of counterfeit Government obligations; with counterfeiting and possessing counterfeited postage stamps of the United States; and with conspiring to commit these various offenses (R. 63–80). All of the offenses charged were felonies. In two of the statutes alleged to have been violated, Sections 148 and 151 of the Criminal Code, an "intent to defraud" is specifically made an element of the offense. Various counts of the indictment charged that the crimes were committed with such intent. Petitioner pleaded guilty and was sentenced to jail (R. 83–84).

It seems too clear for extended argument that the counterfeiting of Government obligations, and especially the commission of those crimes which involved an intent to defraud, were crimes involving moral turpitude. The following crimes have been so characterized: concealing assets from a trustee in bankruptcy (*United States ex rel. Medich* v. *Burmaster*, 24 F. (2d) 57, 58 (C.C.A. 8th), *supra;* issuing a check without sufficient funds (*United States ex rel. Portado* v. *Day*, 16 F. (2d) 328 (S.D.N.Y.)); encumbering mortgaged property with intent to defraud (*United States ex rel. Millard* v. *Tuttle*, 46 F. (2d) 342 (E.D.La.)). In *United States ex rel. Allessio* v. *Day*, 42 F. (2d) 217 (C.C.A. 2d), the court held, without discussion, that counterfeiting was a crime involving moral turpitude. Cases cited by petitioner holding that violations of the National Prohibition Act are not such crimes are obviously inapplicable.

III

PETITIONER WAS LAWFULLY HELD FOR DEPORTATION UPON THE GROUND THAT HE ENTERED WITHOUT INSPECTION WITHIN THE MEANING OF SECTION 19 OF THE IMMIGRATION ACT OF 1917

One of the grounds upon which petitioner was ordered deported was that he had "entered by means of false and misleading statements, thereby entering without inspection" (R. 138). Section 19 of the Immigration Act of 1917 authorizes the deportation, at any time within three years after entry, of any alien "who enters without inspection."

There was evidence that when the petitioner returned from Cuba in 1928 he stated to the immigration officer who examined him that he was a naturalized citizen of the United States and as a result of this statement was admitted as a citizen (R. 90–91). Thus he avoided inspection as an alien applying for admission. The record shows that at the time of his entry petitioner was not a citizen of the United States, his naturalization certificate having been cancelled some years before (R. 22–23). Both courts below held that the petitioner was deportable on the ground that he had entered without inspection (R. 151–153; 185–186).

Inspection of aliens is required to enable the immigrant inspectors to determine their admissibility, and proper record of entering aliens is essential to administration of the immigration laws. There is no provision in the statute for inspection or examination of United States citizens. When the fact of citizenship is established to the inspector's satisfaction, he has no right to submit the citizen to further inquiry. By falsely representing himself to be a citizen, the petitioner escaped the inspection which the statutes provide for aliens. He thus avoided inquiries regarding his conviction of crime which would have been made upon his examination as an alien seeking admission and which, if answered truthfully, would have resulted in his exclusion under Section 3 of the Immigration Act of 1917. Had he been inspected as an alien, other grounds of exclusion might have been developed.

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An alien who avoids inspection by falsely representing himself to be a citizen enters without inspection. *Ex parte Saadi,* 26 F. (2d) 458 (C.C.A. 9th), certiorari denied, *sub nom. Saadi* v. *Carr,* 278 U.S. 616; *Williams* v. *United States ex rel. Bougadis,* 186 Fed. 479 (C.C.A. 2d); *Ex parte Greaves,* 222 Fed. 157 (N.D.Cal.). The latter two cases arose under the Immigration Act of 1907, which did not specifically include entry without inspection as a ground of deportation, but it did require inspection of aliens as to their right to land and provided that "any alien who shall enter the United States in violation of law * * * shall be taken into custody and deported." (See Sections 16, 20, 24, Immigration Act of 1907, c. 1134, 34 Stat. 903, 904, 906.)

The petitioner apparently contends that the *Saadi* case was wrongly decided and relies on certain decisions involving misstatements by aliens in the course of their inspection. (Br. in Support, pp. 22–26.) Those cases are, however, readily distinguishable[2] and they do not reach the ques-

[2] *United States ex rel. Iorio* v. *Day,* 34 F. (2d) 920 (C.C.A. 2d), also cited by petitioner, may not lend itself readily to this distinction. In that case the alien in securing a visa from an American consul abroad falsely stated in his application that he had never been imprisoned, whereas in fact he had been imprisoned at least once for possessing liquor. He was ordered deported on the ground that he had "entered by means of false statements and without inspection." The court held that this ground was bad in law, pointing out that the statute did not make it a ground for

tion here. The misstatements made by the aliens involved did not prevent inspection. They were made in the course of inspection. The inspectors were not bound to believe the aliens and there was such an inspection as the immigration officers chose to give. Thus the true basis for seeking deportation in those cases was that the aliens had made false and misleading statements to the inspectors, but, as pointed out in *Ex parte Gouthro,* 296 Fed. 506, 512 (E.D.Mich.), affirmed *per curiam* 8 F. (2d) 1023 (C.C.A. 6th), that has not been made a ground for deportation. There is an obvious and substantial difference between misleading or false statements in the course of an inspection and an unfounded claim of citizenship which, being accepted, precludes inspection. That was the result of the false statements made by petitioner. We believe that his entry was without inspection quite as much as in the case of the alien in *Ex parte Callow,* 240 Fed. 212 (Colo.), who walked past the immigrant inspector unobserved.

Petitioner contends that he had an absolute right to reenter the United States from Cuba because he was returning to a previously established

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deportation for an alien to make a false oath upon his application for visa. There is some language in the decision which may, perhaps, be regarded as supporting the petitioner's contention, but since the decision apparently proceeded upon the defects in the charge, it should not be considered as a decision that false representation of citizenship does not constitute entry without inspection.

lawful domicile in the United States after a temporary absence, and, accordingly, that inspection in his case was unnecessary.

The Quota Law of 1924 was in effect at the time of petitioner's return from Cuba. This Act defines a "nonquota immigrant" as including, among others, "An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad" (Sec. 4 of the Immigration Act of May 26, 1924, c. 190, 43 Stat. 153, 155; U.S.C., Title 8, Sec. 204). On his return to the United States such an immigrant is required to present an immigration visa stating that he is a nonquota immigrant (Sec. 13 (a), Immigration Act of 1924, 43 Stat. 161, 162 (U.S.C., Title 8, Sec. 213 (a)); Sec. 8, Immigration Act of 1924, 43 Stat. 157 (U.S.C., Title 8, Sec. 208)), unless he is exempted from this requirement by regulations authorized by the Act (Sec. 13 (b), Immigration Act of 1924, 43 Stat. 162; U.S.C., Title 8, Sec. 213 (b)). Under Executive Order 4476, promulgated July 12, 1926, (Paragraph I, subparagraphs (2), (3)) "aliens who have previously been admitted legally into the United States, have departed therefrom and returned within six months, not having proceeded to countries other than * * * Cuba [and certain other nearby countries], are not required to present passports, visas, or permits to reenter"; those going to countries other than those specifically named for temporary visits were permitted, in lieu of visas, to present permits to re-

enter issued pursuant to Section 10 of the Immigration Act of 1924 (43 Stat. 158, U.S.C., Title 8, Sec. 210). It is also provided by regulation that "Aliens lawfully admitted and having a bona fide residence in the United States, who, without relinquishing such residence, visit * * * Cuba [and certain other nearby countries] for a temporary period in no instance exceeding six months", shall be exempted from payment of a head tax. (Rule 1, subdivision K, paragraph (g), Immigration Rules of March 1, 1927.)

It is apparently upon the basis of the foregoing provisions of the statutes and regulations that petitioner rests his argument that he was entitled to return to the United States without inspection. It is clear, however, from the provisions of Sections 2(g), 10(f), and 13(a), 43 Stat. 153, 154, 159 (U.S.C., Title 8, Secs. 202, 210, 213), of the Immigration Act of 1924 that the various provisions with respect to visas or reentry permits do not render eligible for entry those aliens otherwise inadmissable. The possession of a visa or return permit does not absolutely entitle the alien to reenter the United States. He must still be entitled to entry under Section 3 of the Immigration Act of 1917. As Section 25 of the Immigration Act of 1924, c. 190, 43 Stat. 166, U.S.C., Title 8, Sec. 223, declares that the provisions of that Act are in addition to and not in substitution for the provisions of the immigration laws, and that an alien, although admissible under the provisions of that Act, shall

not be admitted to the United States if he is excluded by any provision of any other immigration law. If, for example, he has contracted a loathsome or contagious disease between the time of his departure and the date of his reentry, he is as much subject to exclusion as an alien who enters for the first time (*Fee Fuk Yuen* v. *White,* 273 Fed. 10 (C.C.A. 9th)). His visa or reentry permit does not protect him against exclusion. (*Ex parte Di Stephano,* 25 F. (2d) 902, 903 (Mass.), and cases cited; *United States ex rel. Georgas* v. *Day,* 43 F. (2d) 917 (C.C.A. 2d). See also *Elting* v. *North German Lloyd,* 287 U.S. 324, 328, 329; *Lloyd Sabaudo Societa* v. *Elting,* 287 U.S. 329, 341; *Ex parte Li Dick,* 174 Fed. 674, 681 (N.D.N.Y.). The issuance of a visa or permit does not estop the immigration authorities from contesting the alien's right of admission as an immigrant not subject to quota. (*United States ex rel. Lesto* v. *Day,* 21 F. (2d) 307 (C.C.A. 2d).) Accordingly, when the petitioner returned to the United States from Cuba, it is clear that he was subject to inspection and was required to be prepared to make a proper showing of all the facts necessary to establish his claim to admission. Cf. *United States ex rel. Stapf* v. *Corsi,* 287 U.S. 129, 133, *supra.*

The fact that visas or return permits are dispensed with where aliens visit nearby countries for periods of less than six months does not affect the necessity for inspection to determine whether the aliens may reenter.

Petitioner relies on *In re Wysback,* 292 Fed. 761 (Mass.) to establish that there was no necessity for his inspection. That decision was clearly erroneous for the reasons cogently stated in *United States ex rel. Natali* v. *Day,* 45 F. (2d) 112, 113; see also *Ex parte Fragoso,* 11 F (2d) 688 (S.D. Cal.).

Petitioner urges that the omission from the bill which became the Act of March 4, 1929 (c. 690, 45 Stat. 1551, Secs. 1 to 4, U.S.C., Sup. V, Title 8, Sections 180 to 180(d), of a provision for the deportation of aliens who make false representations to immigration officials, is an indication that Congress did not regard such conduct as petitioner's as a ground for exclusion or deportation. While inclusion of the provision omitted would undoubtedly have supplied the omission in the Immigration Acts recognized in the cases cited by petitioner, which hold that the making of false representations in connection with the inspection of an alien is not ground for exclusion or deportation, such a provision was quite unnecessary to permit deportation in a case like the present. The provisions of existing law authorizing the deportation of aliens who enter without inspection was entirely adequate to cover the petitioner's case. Examination of the report of the House Committee on Immigration and Naturalization (H.Rep. 2418, 70th Cong., 2d Sess., pp. 3–4) does not show that the Committee regarded existing provisions of law as not covering those who escape inspection by false statements.

We believe that both courts below correctly held that the petitioner had entered without inspection within the meaning of Section 19 of the Immigration Act of 1917, and he was, therefore, deportable upon that ground as well as upon the ground of his conviction of a crime involving moral turpitude prior to entry.

IV

PETITIONER'S ALIENAGE WAS SUFFICIENTLY ESTABLISHED

Petitioner contends that the Government failed to prove that he was an alien and complains because there was not introduced at the immigration hearing a copy of the order cancelling petitioner's certificate of naturalization. It is also suggested that if there was such an order it was void under the Act of June 29, 1906, c. 3592, Sec. 15, 34 Stat. 601, as amended (U.S.C., Title 8, Sec. 404).

We submit that the question is not properly before the Court. It was not raised in the petition for *habeas corpus* (R. 2–6) in the assignments of error in the court below (R. 156–162) and was not discussed in either of the opinions below. Even if it may be considered here, the point is without merit.

The order of deportation in this case recites that petitioner is an alien (R. 138). The decisions of this Court establish that this finding must be sustained if supported by any evidence. *Bilokumsky* v. *Tod*, 263 U.S. 149, 153, *Costanzo* v. *Tillinghast*, 287 U.S. 341, 343, and cases cited.

An examination of the record before the immigration authorities shows that there was ample evidence to sustain the finding that petitioner was an alien. Petitioner in effect admitted his alienage and that his naturalization certificate had been cancelled. (R. 21–23, 27, 46, 49, 55. See also petioner's twentieth assignment of error in the court below, R. 160–161.) We believe that the evidence of alienage in this case was more persuasive than in the *Bilokumsky* case, *supra,* where the inference of alienage was drawn from the alien's silence. Petitioner does not now assert that he is a naturalized citizen of the United States. If there were any doubt about petitioner's alienage it is inconceivable that the question would not have been presented by him below. Upon the whole record there seems to be no basis for attacking the finding of alienage.

Petitioner's complaint that the immigration authorities should have proved the cancellation of his naturalization certificate by offering an authenticated copy of the order of cancellation does not affect the validity of the order of deportation. That would have been the simpler way to prove his alienage but his admissions were equally effective.

Petitioner questions the validity of the order of cancellation. There is some evidence in this record that the application for cancellation was made by the petitioner (R. 22–23) and, accordingly,

the provision for notice in the portion of the Naturalization Act upon which petitioner relies, relating to applications for cancellation by the Government, has no application. Furthermore, the proper place to attack the order was in the proceeding in which the cancellation occurred and not collaterally in this proceeding. On this record the courts below would have been amply justified in concluding that the finding of alienage was not without evidence to support it, and not having raised the question below the petitioner is not in a position to question the finding in this Court.

V

PETITIONER HAD A FAIR HEARING

Petitioner attacks the fairness of the immigration hearing upon a number of grounds which we shall discuss *seriatim*. The applicable principles have been settled by the decisions of this Court. Within the rules announced in *Bilokumsky* v. *Tod*, 263 U.S. 149, 157, *supra*, and *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106, there seems to us to be no doubt, upon examination of the whole record, that petitioner was accorded a fair hearing.

The grounds of attack upon the fairness of the hearing are:

1. Petitioner urges that the testimony of Immigrant Inspector Phillips, with respect to the statements by the petitioner when he reentered from

Cuba, was incredible. There was undoubtedly a conflict between the testimony of Phillips and the testimony of petitioner's witnesses, but, upon review, the decision of the immigration officers cannot be set aside if there was evidence to support their conclusion, and the mere fact that the testimony was conflicting does not justify a conclusion that the relator was unlawfully held for deportation. That is not the function of a writ of habeas corpus. See *Vajtauer* v. *Commissioner, supra.*

The administrative officers were clearly justified from the evidence in concluding that the petitioner had represented to Inspector Phillips that he was a naturalized citizen. Inspector Phillips' positive testimony that the petitioner had stated to him that he was a naturalized citizen of the United States (R. 90) was corroborated by documentary evidence (R. 27, 85–86, 89–90, 133–135). This documentary evidence showed that petitioner appeared on the list of United States citizens delivered to Inspector Phillips on the occasion of petitioner's arrival by airplane from Cuba (R. 89, 133). It seems obvious that the information on this list must have been furnished by petitioner and the inspector testified that he entered on the list opposite petitioner's name the fact that petitioner had been born in the Argentine, and that this was done in the case of naturalized citizens (R. 90). On the other hand, petitioner's testimony that he had not told the inspector that he was a nat-

uralized citizen, but only that he had obtained his first papers, was corroborated only by the oral testimony of some of petitioner's companions, and was wholly uncorroborated by contemporary documentary evidence. In these circumstances, the administrative officers were certainly justified in accepting the Inspector's corroborated evidence instead of the uncorroborated evidence offered on behalf of petitioner. Petitioner suggests that even though Phillips' testimony was entitled to credit, it was necessary for the Government to prove petitioner's knowledge of the falsity of his claim to be a naturalized citizen, but in view of the importance to the petitioner of his naturalization and the significance of the cancellation of his naturalization certificate the immigration officers were entitled to infer such knowledge on his part.

2. Petitioner complains of the failure to produce at Government expense certain immigration inspectors stationed in Florida and the employee of an aeroplane company which transported petitioner from Cuba to Florida. The immigration officer who presided at the hearing was clearly justified in refusing to produce these witnesses at Government expense (R. 123–124, 127–128). The inspectors involved had no direct connection with petitioner's entry and the employee of the aeroplane company was quite as available to petitioner as to the Government. Petitioner was offered an opportunity to bring the desired witnesses to the

hearing at his own expense, but declined to do so (R. 128). Petitioner also complains of the failure to produce an alien manifest which contained the name of the alien, who declared himself to be such, accompanying petitioner's party from Cuba (R. 102, 114, 116–117), but petitioner's name did not appear upon the alien manifest since he declared himself to be a citizen. As it was merely corroborative of Inspector Phillips' testimony, there was no necessity for prolonging the hearings until it could be sent to Chicago from Florida.

3. Petitioner complains because he was asked about a number of previous arrests upon various criminal charges and as to his associations with certain notorious Chicago gangsters. The Government was not precluded by the charges contained in the warrant of arrest from any inquiry which might have a bearing upon petitioner's right to remain in this country, and it was entitled to include in the warrant of deportation any ground therefor developed at the hearing, provided petitioner was given an adequate opportunity to answer the new charges. *Gonzales* v. *Zurbrick*, 45 F. (2d) 934 (C.C.A. 6th); *Marty* v. *Nagle*, 44 F. (2d) 695, 696 (C.C.A. 9th), petition for certiorari dismissed, 283 U.S. 868; *United States ex rel. Bauder* v. *Uhl*, 211 Fed. 628, 633 (C.C.A. 2d). Furthermore, petitioner is estopped to question the fairness of the hearing on this ground because, at the conclusion of the portion of the hearing at which all of the challenged inquiry occurred, the

petitioner's counsel conceded that the hearing had been entirely fair (R. 48).

4. Petitioner contends that he should have been allowed to explain his plea of guilty in the counterfeiting case. It is settled, however, that the record of conviction of an alien in a criminal case is conclusive in immigration hearings for his reportation. *Ng Sui Wing* v. *United States*, 46 F. (2d) 755 (C.C.A. 7th); *Tillinghast* v. *Edmead*, 31 F. (2d) 81 (C.C.A. 1st); *United States ex rel. Mylius* v. *Uhl*, 210 Fed. 860.

5. Petitioner contends that the hearing was unfair because his witnesses were excluded from the hearing room while Inspector Phillips was allowed to be present when petitioner identified himself. This point seems adequately disposed of in the opinion of the District Court (R. 153–154) where it is pointed out that the record shows no application for the exclusion of witnesses, nor is there anything to show that petitioner's witnesses were excluded, as he contends. Furthermore, there does not appear to be any established practice with reference to the exclusion of witnesses in such cases. (R. 143–144.) Under the circumstances, certainly the matter of exclusion rested in the sound discretion of the presiding officer.

Consideration of the entire record shows that there was no denial of a full and a fair trial and that the hearings were conducted with scrupulous regard to petitioner's rights which were also adequately protected by his counsel.

CONCLUSION

If the case has not abated, we respectfully submit that petitioner may be deported on either of the grounds stated in the warrant of deportation, and that he was accorded a fair hearing by the immigration authorities.

Respectfully submitted.

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MAY, 1933.

APPENDIX A

Pertinent provisions of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, 875, 889–890:

SEC. 1. That the word "alien" wherever used in this Act shall include any person not a native-born or naturalized citizen of the United States; * * * . (U.S.C., Title 8, Sec. 173.)

SEC. 3. That the following classes of aliens shall be excluded from admission into the United States: * * * persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude: * * *. (U.S.C., Title 8, Sec. 136.)

SEC. 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; * * * except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment be-

cause of conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * * any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; at any time within three years after entry, any alien * * * who enters without inspection, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported: * * * *Provided further*, That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment; * * *. (U.S.C., Title 8, Sec. 155.)

APPENDIX B ON THE QUESTION OF ABATEMENT

We have heretofore filed a suggestion of abatement in this case. While we do not desire to delay the disposition of the case and would willingly consent to waive the question of abatement, we think there is sufficient doubt about the question to make it our duty to bring together the considerations which seem to have a bearing upon the question.

Petitioner was taken into custody in Chicago by Immigrant Inspector Ellefson (R. 14) under a warrant of arrest addressed to the "District Director of Immigration, Chicago, Ill. Or to any Immigrant Inspector in the service of the United States" (R. 13). He was released under a bond in the sum of $10,000 which recited, the immigration file shows, his arrest and contained the following condition:

> AND WHEREAS, pending the final disposal of his case the said alien desires to avail himself of the privilege of being released from custody accorded by section 20 of the Act of Congress approved February 5, 1917 (39 Stat.L. 874), and has applied to the immigration official by whom said warrant has been served for his release upon giving a proper bond or undertaking that he will deliver himself into the custody of the said immigration official or other proper immigration official representing the United States Government for hearing or hearings and for deportation in case he is found to be unlawfully within the United States;

> NOW, THEREFORE, the condition of this obligation is such that if the above-bounded alien shall, in case he is released from custody, deliver himself into the custody of the said immigration official or other proper immigration official representing the United States Government for hearing or hearings in regard to the charge upon which, as above set forth, he has been taken into custody, and if, in case the said alien, upon such hearing or hearings, is found to be unlawfully within the United States, and is for any reason released from custody pending issuance of a warrant of deportation or after said warrant has been issued and pending final deportation, the said alien shall at any time, upon request, deliver himself into the custody of the said immigration official for deportation under the aforesaid warrant delivery either for hearing or hearings for deportation to be made upon request of the proper immigration official, and to be complete only upon acceptance of said alien by said immigration official, then this obligation to be void; otherwise to remain in full force and virtue.

Hearings were held in Chicago before Immigrant Inspector Ellefson (R. 14, 20, 41, 87), and on April 28, 1931, a final warrant of deportation was issued, which was directed to the "District Director of Immigration, Chicago, Illinois, Commissioner of Immigration Ellis Island, N.Y.H., Or to any Officer or Employee of the United States Immigration Service" (R. 138).

Under the immigration rules prescribed by the Commissioner General of Immigration and approved by the Secretary of Labor, the United States is divided into over thirty administrative

districts for convenience in enforcing the immigration and Chinese exclusion laws. In some of these districts Commissioners of Immigration are in charge and in others District Directors (Rule 30, Immigration Rules of January 1, 1930). District Directors of Immigration are appointed pursuant to Section 24 of the Immigration Act of 1917, c. 29, 39 Stat. 874, 893 (U.S.C., Title 8, Sec. 109), which provides "That immigrant inspectors and other immigration officers, clerks, and employees shall hereafter be appointed and their compensation fixed and raised or decreased from time to time by the Secretary of Labor, upon the recommendation of the Commissioner General of Immigration and in accordance with the provisions of the civil-service Act of January sixteen, 1883 * * *." Under Section 23 of that Act (U.S.C., Title 8, Sec. 108), "The duties of Commissioners of Immigration and other immigration officials in charge of districts, ports, or stations, shall be of an administrative character, to be prescribed in detail by regulations prepared under the direction or with the approval of the Secretary of Labor * * *." The regulations prescribed by the Secretary of Labor provide that

> The duties of district directors shall be in all respects similar to the duties of commissioners of immigration, and such district directors shall have the same power and authority as commissioners of immigration. (Rule 29, subdivision B, par. 1, Immigration Rules of 1930.)

and that

> The duties of a commissioner of immigration shall be of an administrative character, and such commissioner shall at all times be

> subject to the immediate control, direction, and supervision of the Commissioner General of Immigration, and shall promptly obey and carry out all orders and directions that may from time to time be issued by said Commissioner General. Commissioners of immigration shall have the control, direction, and supervision of all officers, clerks, and employees within their respective jurisdiction, and may, with the approval of the Commissioner General, prescribe rules and regulations, not inconsistent with law, for the transaction of business and the custody, use, and preservation of records and papers and to govern and control their officers, clerks, and employees. (Section 23, act of February 5, 1917.) (Rule 29, subdivision A, par. 1).

Under Rule 30 of the Immigration Rules, *supra,* Chicago is in District No. 14, and is in charge of a District Director. The extent of that district is stated in the rule to be—

> that part of the State of Indiana lying north of the counties of Vermillion, Fountain, Montgomery, Clinton, Howard, and Miami and west of the counties of Wabash, Kosciusko, and Elkhart; all that part of the State of Wisconsin lying south of the counties of Florence, Forest, Oneida, Lincoln, Taylor, and Vernon and east of the counties of Clark, Jackson, and Monroe; that part of the State of Iowa lying east of the counties of Winneshiek, Fayette, Delaware, Linn, Johnson, Washington, Henry, and Lee; and that part of the State of Illinois lying north of the counties of Hancock, McDonough, Mason, Logan, DeWitt, Piatt, Douglas, and Edgar.

The petition for habeas corpus alleged that petitioner was held in custody under a warrant of de-

portation by S. D. Smith, "Inspector in charge of immigration at Chicago, Illinois" (R. 2), and the writ of habeas corpus was addressed to "S. D. Smith, Immigration Inspector in Chicago" (R. 9). The return to the writ, however, recited that it was made on behalf of "S. D. Smith, District Director of Immigration at Chicago, Illinois", and was signed by Smith as "District Director of Immigration" (R. 10, 12). The order of the District Court of June 16, 1931, dismissing the writ of habeas corpus provided that "the relator, Anthony Volpe, be remanded to the custody of the respondent S. D. Smith, District Director of Immigration for deportation to Italy" (R. 155). An immediate appeal was taken from this order by petitioner to the Circuit Court of Appeals for the Seventh Circuit (R. 156, 163). In the order allowing this appeal, it was provided that the "appeal shall operate as a supersedeas and the defendant be admitted to bail during the pendency of this appeal upon filing a bond in the sum of three thousand ($3,000) dollars with good and sufficient surety within ten days" (R. 163). Examination of a certified copy of this bond shows that it was conditioned as follows:

> Now the condition of said obligation is such, That if the said Anthony Volpe shall appear in person in the United States Circuit Court of Appeals for the Seventh Circuit on the sixth day of October, A. D. 1931, of the October Term, 1931, and from day to day thereafter in said Court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the United States Circuit Court of Appeals for the Seventh Circuit, in said

> cause, and shall surrender himself in execution of the judgment appealed from as said Court may direct, if the judgment against him shall be affirmed or the appeal is dismissed, and if he shall appear for trial in the District Court of the United States, for the Northern District of Illinois, Eastern Division, on such day or days as may be appointed for retrial by said District Court and abide by and obey all orders of said Court, provided the judgment against him shall be reversed by the United States Circuit Court of Appeals for the Seventh Circuit, then the above obligation to be void; otherwise to remain in full force, virtue, and effect.

The order of the District Court dismissing the writ of habeas corpus was affirmed by the Circuit Court of Appeals on January 11, 1933 (R. 196), but the case was not finally disposed of until February 1, 1933, when a petition for rehearing filed by the petitioner was denied (R. 197).

On January 15, 1932, while the case was pending on appeal in the Circuit Court of Appeals respondent Smith, according to information received from the Department of Labor, was appointed District Director of Immigration at Salt Lake City, Utah. He entered upon his duties there on February 1, 1932, but we have been unable to ascertain the date he took the oath of office. The Utah District is District No. 27 and its territory "includes the State of Utah; that part of the State of Wyoming lying west of meridian 109 and south of parallel 44; that part of the State of Idaho lying south of parallel 44; and that part of the State of Nevada lying north of parallel 37 and east of meridian 117" (Rule 30, Immigration Rules of 1930).

Smith's successor as District Director of Immigration at Chicago was C. Alfred Palmer, who was appointed January 14, 1932, and entered upon the duties of his office February 1, 1932, and took the oath of office March 3, 1932. No substitution has been made in the instant case of Palmer for Smith.

Section 11 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 941 (U.S.C., Title 28, Sec. 780) provides that

> Where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession and relating to the present or future discharge of his official duties, *such officer* dies, resigns, or *otherwise ceases to hold such office*, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or *separation from the office* it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved. (Italics ours.)

The present suit was obviously brought to prevent the present or future discharge by the respondent Smith of his duties with reference to the execution of the warrant of deportation. The warrant is not self-executing, and the immigration offi-

cer in charge of the particular district where a deportation proceeding has taken place has certain duties which are imposed upon him in connection with deportation by the regulations of the Secretary of Labor. To enumerate some of those duties in the ordinary case, he must secure a passport for the deportee, if a passport can be obtained locally; this passport must be forwarded to the port of departure (Rule 19, subdivision H, pars. 1, 2); and arrangements must be made for the transportation of the deportee and his personal effects (Rule 19, subdivisions P and Q, Immigration Regulations, 1930). Special provisions are made in the regulations for the deportation of insane or diseased aliens (Rule 20, Immigration Rules, 1930), and if the alien is to be deported to Canada or Mexico, certain additional duties are imposed upon the immigration officer in charge of the district wherein the case originated (Rule 19, subdivisions I and J, Immigration Rules of 1930). Obviously, it would tend to cause confusion in the administration of the immigration laws if the immigration officer in charge of one district could go into another district and perform the duties which under the regulations properly fall to the lot of another District Director. The regulations clearly do not contemplate that a District Director shall have a roving commission, although it may be conceded that there is no prohibition therein which would preclude Smith from going to his old district for the purpose of completing his duties in connection with this case.

In response to the suggestion of abatement petitioner contends that Smith has not "ceased" to hold the office of District Director of Immigra-

tion, even though he has been placed in charge of another district. This seems to ignore the fact that the instant suit was brought against Smith in connection with the discharge of duties imposed upon him as District Director of Immigration in charge of the Chicago District. Apparently, he has ceased to hold that office quite as much as if he had been appointed to such a post as stenographer in the Salt Lake immigration office. It is true that he is still a District Director of Immigration, but the position which he now holds is so distinctly a different position as to require the taking of a new oath of office.

On its face, the warrant of deportation indicates that it may be executed by anyone in the immigration service, but there are practical difficulties attending execution which suggest that the broad form of the warrant does not necessarily control. As we have indicated, under the regulations the initial steps incident to the deportation of an alien, in the absence of exceptional circumstances, are taken by the immigration officer in charge of the district wherein the case originated, i.e., the district where the alien was arrested and the deportation proceedings were held. As will be seen from the memorandum dated April 12, 1933, prepared for the Solicitor of the Department of Labor at the request of the Solicitor General by the Chief of the Deportation Division of the Bureau of Immigration, which is printed as Appendix C, the warrant of deportation is addressed not only to the District Director of Immigration in charge of the district having jurisdiction of the deportation proceedings but to "any officer or employee of the United States Immigration Service" merely as a protection to

any such officer who may have charge of the custody of the deportee while he is being transported from the district where the deportation proceedings were held to the port of departure. The view that Smith may still execute the warrant of deportation even though he is not now District Director of Immigration in Chicago, because of the apparently broad grant of authority contained in the warrant, seems to leave out of consideration the purpose of that grant as indicated by the regulations and practice with respect to the execution of deportation warrants. On the other hand, it seems by no means certain that these practical difficulties could not be overcome in the novel circumstances of this case.

The view that there has been no abatement is fully presented in a reply brief filed by petitioner in answer to the Government's suggestion of abatement and we submit this phase of the case for the consideration of the Court. While we have felt it to be our duty to supply the Court with all the information on the subject which is available, it would be desirable to have the case disposed of on the merits and we should be glad to have the Court conclude that there has been no abatement.

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APPENDIX C

Memorandum Prepared by the Chief of the Deportation Division of the Bureau of Immigration, Department of Labor, April 12, 1933

In re execution of warrants of deportation under the immigration laws

It is to be pointed out first of all that by regulations issued under the authority of Section 23 of the Immigration Act of 1917 the Commissioner General of Immigration, with the approval of the Secretary of Labor, has divided the country into a number of districts for immigration purposes, Rule 28 of Rules of March 1, 1927, and Rule 30 of Rules of January 1, 1930. These rules also designate the title of the officer in each district who shall have jurisdiction and charge of the officers and employees in such district enforcing the immigration law; for instance, a Commissioner of Immigration, for the District including New York City, and a District Director of Immigration, for the District including Chicago, Illinois.

Every warrant issued under Section 19 of the Immigration Act of February 5, 1917, by, or under authority from, the Secretary of Labor, directing the deportation of an alien, is addressed to immigration officers and employees of the Immigration Service generally, and to two of them by title, one being the officer in charge of the district where the

alien is being detained or his bail bond contemplates delivery, which in either case is usually the district in which the deportation proceeding originated, and the other officer being the officer in charge of the district from which the alien is to be deported. For example, in the case of an alien where the proceeding looking to deportation has been instituted in the district including Chicago, and deportation is to be from the port of New York, the warrant directing deportation is addressed to—

> District Director of Immigration, Chicago, Illinois.
> Commissioner of Immigration, Ellis Island, N.Y.H. Or to any Officer or Employee of the United States Immigration Service.

The original warrant is sent to the official first named in the address, in that case to the District Director of Immigration at Chicago, and a copy is sent to the Commissioner of Immigration at New York. If the alien is at large under bond, the District Director of Immigration at Chicago, acting under authority of the warrant calls upon the bondsman for the delivery of the alien to an officer or employee of the Immigration Service at a designated time and place. If the alien pending the proceeding looking to deportation has not furnished bond, he has remained in detention, usually a local jail. The District Director of Immigration at Chicago then directs an immigrant inspector or other employee of the Immigration Service to remove the alien from the place of detention, or accept him from the officer or employee who received him from the bondsman, as the case may be, and deliver him

to the officer or employee who is to transfer the alien to the port of New York. The Commissioner of Immigration there has authority to receive the alien by virtue of the fact that the warrant is addressed to that officer. An immigrant inspector or employee of the Immigration Service designated by the Commissioner at New York delivers the alien in due course into the custody of the master of the vessel with whom arrangements have been made for the alien to be transported out of the country. The practice is that each officer and employee taking and holding custody of the alien in the above-stated steps is at such time in possession of the original warrant of deportation, as it is passed from one officer or employee to the next one in this series of steps, and each such officer or employee is within the address of the warrant. He derives his authority from that fact, the instructions from superior officers not being delegations of authority but only matters of administrative control. The officer or employee who delivers the alien to the master of the vessel for deportation verifies the departure of the alien on the vessel, and such officer over his signature endorses on the original warrant the fact of deportation, the date thereof, and the name of the vessel on which the alien was deported. In due course the original warrant is returned to the Bureau of Immigration and attached to the file relating to the alien.

JOHN CROWN,
Chief, Deportation Division.

Approved:

HARRY E. HULL,
Commissioner General of Immigration.

U. S. GOVERNMENT PRINTING OFFICE: 1933